

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0359-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DARRON CAMPBELL,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053420

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

Darron Campbell

Winslow
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Following a jury trial, petitioner Darron Campbell was convicted of possession of a narcotic drug for sale, a class two felony, and unlawful possession of drug paraphernalia, a class six felony, both committed while Campbell was on parole. The trial court imposed concurrent, presumptive terms of imprisonment, the longer of which is 15.75 years. After

Campbell filed his notice of direct appeal,¹ he filed a pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied relief without conducting an evidentiary hearing, and this petition for review followed. “We will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 Campbell first contends he was entitled to relief on his claims that the trial court abused its discretion by terminating his right to represent himself just before the trial began and by admitting evidence of his prior drug use at trial. Although the trial court reached the merits of these claims in its ruling on Campbell’s petition for post-conviction relief, we need not do so here because Campbell was precluded from raising them in these proceedings. Rule 32.2(a)(1) and (3) precludes claims for relief based on any ground raisable on appeal or waived at trial, on appeal, or in any previous collateral proceeding. Campbell could have raised these claims on appeal, and he has not shown they fall under any ground excepted from preclusion by Rule 32.2(b). Therefore, we find the trial court properly denied them. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court “if the result was legally correct for any reason”).

¶3 Campbell also argues he is entitled to relief because the state tampered with exhibits, destroyed documents, and elicited false testimony at trial. Although Campbell suggests these claims are based on newly discovered evidence, presumably justifying relief

¹Campbell’s appeal is pending before this court.

under Rule 32.1(e), he fails to explain how they fall within the scope of that rule.² Aside from mentioning that his claims arise from newly discovered evidence, Campbell utterly fails to explain how the requirements of Rule 32.1(e) have been satisfied. Because these claims appear to be based on newly discovered evidence in name only, and because Campbell has asserted no other ground for relief under Rule 32, they are likewise precluded. *See* Rule 32.2(a)(1) and (3).

¶4 We next address Campbell's claims of ineffective assistance of his trial counsel, Leo Plowman. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A trial court is required to conduct an evidentiary hearing only when a colorable claim has been presented, "one that, if the allegations are true, might have changed the outcome" of the case. *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

²To constitute newly discovered evidence justifying relief, the evidence must have existed at the time of trial but have been discovered after trial; the defendant must have exercised due diligence in discovering the evidence; the evidence may not be cumulative or impeaching, and it must be relevant; the evidence must also be such that the outcome of the case would likely have been different had it been present at trial. *See State v. Apelt*, 176 Ariz. 349, 369, 861 P.2d 634, 654 (1993). All of these elements must be satisfied to establish a claim of newly discovered evidence. *See State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993).

¶5 Campbell represented himself throughout the pretrial proceedings, and Plowman acted as advisory counsel. Following an outburst by Campbell just before the trial began, the court terminated Campbell's right to represent himself and appointed Plowman as trial counsel. Following yet another outburst by Campbell in front of the jury during Plowman's opening statement, Plowman moved for a mistrial and to withdraw as counsel on the ground Campbell did not like Plowman's strategy. The court denied both motions. After Campbell told the judge he did not "agree to anything [Plowman was] saying . . . [and he did not] want to have any contact with [Plowman]," Campbell was permitted to provide narrative testimony to the jury.

¶6 Campbell argues he was entitled, at the very least, to an evidentiary hearing on the following claims: Plowman was presumptively ineffective, as evidenced by his having "conceded" Campbell's guilt to possession of a narcotic drug; Plowman failed to object to the "duplicitous nature of the indictment" and to the admission of evidence that Campbell had previously used drugs; and Plowman failed to call witnesses to support Campbell's position that he was guilty of "simple possession" rather than sale of a narcotic drug and to explain why he was carrying \$1,148 in cash when he was arrested. We find no abuse of discretion in the trial court's conclusion that Plowman's conduct was based on trial strategy and that the outcome at trial would not have changed even if Plowman's strategy had been different. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" that "might be considered sound trial

strategy.” *Strickland*, 466 U.S. at 669, 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955); see also *State v. Shurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). As the trial court noted, Campbell was arrested with “over twice the threshold amount for the sale of crack cocaine in his pocket.” See A.R.S. §§ 13-3401(36)(c), 13-3408(A)(2). Further, Campbell’s complaint that Plowman conceded the fact of possession is inconsistent with his claim that Plowman failed to argue “simple possession.”

¶7 In addition, to the extent Campbell suggests prejudice should be presumed in this case because of counsel’s concession that Campbell had possessed a narcotic drug, we disagree. “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *United States v. Cronin*, 466 U.S. 648, 659 (1984). But an “attorney’s failure must be *complete*” before prejudice will be presumed. *State v. Glassel*, 211 Ariz. 33, ¶ 63, 116 P.3d 1193, 1211 (2005), quoting *Bell v. Cone*, 535 U.S. 685, 697 (2002) (emphasis in *Glassel*). That was not the case here. Plowman questioned witnesses, gave an opening statement and closing argument, and moved for a judgment of acquittal. The record before us does not show Campbell was denied the right to counsel.

¶8 Regarding Campbell’s claim that Plowman failed to object to the “duplicitous nature of the indictment,” it is not entirely clear from the record before us when Plowman was appointed as advisory counsel. It is clear, however, that Campbell represented himself

during the pretrial proceedings, when such an objection could have been made. *See State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005) (requiring pretrial objection to allegedly duplicitous indictment). Moreover, Campbell has failed to explain how he was prejudiced by this asserted error. We also conclude the trial court correctly denied Campbell's claim that Plowman should have objected to the admission of evidence regarding Campbell's prior drug use. The record shows that Campbell himself asked the trial court to permit testimony about his prior convictions, at least one of which included a drug-related offense, thereby opening the door to such evidence. *See State v. Leyvas*, No. 2 CA-CR 2007-0340, ¶ 25, 2009 WL _____ (Ariz. Ct. App. Mar. 30, 2009) (no reversible error when party complaining of it invited error).

¶9 Accordingly, although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge